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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 590

C. EDWARD DAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA; LAWRENCE S. CAMP, AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF GEORGIA; N. A. McKEW, AS UNITED STATES POSTAL INSPECTOR, AND F. R. KENDRICK, AS CLERK OF THE SUPERIOR COURT OF MURRAY COUNTY, GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

D. H. REDFEARN,
R. H. FERRELL,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on the 18th day of October, 1943, affirming the judgment of the District Court of the United States for the Northern District of Georgia (R. 63). A petition for rehearing was filed (R. 64) and the same was denied on the 3rd day of December, 1943 (R. 71).

Opinions Below.

The final judgment of the district court (R. 30-32) is unreported. The opinion of the United States Circuit Court of Appeals (R. 61-63) is reported in 138 F. (2d) 406.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. A., Section 347(a).

Question Presented.

Where an administrator's deed is sent by mail from Miami, Florida, to the clerk of the Superior Court of Murray County, Georgia, with money to cover recording charges; and where a United States postal inspector had anticipated the filing of such a deed and had instructed said clerk to call him when it arrived; and where said clerk received said deed, recorded it, advised by long distance telephone said inspector that he had said deed, and then held it for four days until said inspector obtained possession of it by an illegal order of the Judge of the Superior Court of said Murray County; and where said inspector then delivered it to the United States district attorney at Atlanta, Georgia, for his investigation and study and after twenty-eight days said inspector returned it to said clerk but simultaneously therewith the United States marshal served said clerk with a subpoena duces tecum commanding him to produce said deed before the federal grand jury at Atlanta, Georgia; and where by appropriate proceedings petitioner promptly sought to quash, suppress and withhold from said grand jury said deed and have the same returned to him, but said relief was denied by the District Court of the United States for the Northern District of Georgia, and said judgment was affirmed by the Circuit Court of Appeals,

did said judgment and its affirmance deny said sender of the deed the rights guaranteed to him by the Fourth and Fifth Amendments to the Constitution of the United States.

Statement.

On December 2, 1941, F. R. Kendrick, Clerk of the Superior Court of Murray County, Georgia, received at Chatsworth, Georgia, through the United States mail, an administrator's deed sent him by C. Edward Davis, of Miami, Florida, for recording on the public records of said county. Money to cover the fees for recording was enclosed with the deed (R. 55). The deed purported to convey approximately 1,750 acres of wild lands in Murray, Whitefield, Dawson and Lumpkin Counties, Georgia. On December 5, 1941, said deed was recorded in Deed Book 15, page 349 (R. 36, 44). Previous to the receipt of said deed by said clerk and its recording, United States postal inspector N. A. McKew, had visited clerk Kendrick's office and had told him that he expected him to call him next time Davis sent him a deed to be recorded (R. 44). Kendrick complied with said instructions by calling McKew by long distance telephone and upon McKew's visit to said clerk's office, said clerk showed him the deed. They then went together to see Judge John C. Mitchell, judge of the Superior Court of Murray County, Georgia, taking the deed with them (R. 45). On the 8th day of December, 1941, said McKew presented to the judge of said Superior Court the unverified petition of Lawrence S. Camp, as District Attorney, of the United States, in which it was alleged that said administrator's deed was in the possession of Kendrick, the clerk of the Superior Court of Murray County, and that it attempted to convey to C. Edward Davis certain lands in Murray County, title to which was in and possession held by the United States. The petition prayed for an order directing clerk Kendrick to deliver said deed to postal inspector McKew,

as agent of the United States district attorney, for the purpose of an examination thereof (R. 8-9). Thereupon, said judge entered an order authorizing and directing the delivery by said clerk of said deed to said postal inspector McKew for a period not to exceed thirty days (R. 10). On December 9, 1941, said deed was delivered under said order to said inspector (R. 11) who took it to said United States attorney. On an examination thereof by said attorney "certain other facts were disclosed" which said attorney deemed sufficient to authorize a criminal investigation (R. 47-48). On January 6, 1942, said McKew returned said deed to said clerk, (R. 11) but immediately thereupon said Kendrick was served with a subpoena duces tecum calling for the production by him of said document before the federal grand jury in Atlanta, Georgia, on the 9th day of March, 1942 (R. 37, 38, 39, 40). On the 25th day of February, 1942, C. Edward Davis filed before Honorable E. Marvin Underwood, Judge of the District Court of the United States for the Northern District of Georgia, at Atlanta, his motion and petition to quash, suppress and withhold from said grand jury the said administrator's deed and for its return to him (R. 3-10). Rule Nisi was issued on said motion (R. 11). Responses were filed by the United States, the said N. A. McKew, as postal inspector, and F. R. Kendrick, as said clerk (R. 16-18, 19, 20-28). On July 7, 1942, a hearing upon said motion to suppress was had. Stipulation was entered into as to the salient facts (R. 37-38). Oral testimony of clerk Kendrick and assistant United States attorney, Astor Merritt, was adduced.

The said Merritt testified that he prepared the petition presented to Judge Mitchell of the Superior Court of Murray County, at the direction of the United States district attorney because it was their opinion that the deed constituted a cloud upon the title to lands of the United States

and that an investigation of said deed should be made; but that upon the investigation by said United States attorney "certain other facts were disclosed" which said attorney deemed sufficient to authorize a criminal investigation (R. 47-49). A motion to enter judgment upon the pleadings and stipulation was over-ruled (R. 28-29). After full hearing on the petition and motion to quash and suppress the use of said deed as evidence before the federal grand jury, and for the return thereof to petitioner, the court overruled and denied the same and ordered said deed impounded in the district court of the United States by depositing the same with the clerk of said court (R. 51), and then ordered the return of said deed to said Kendrick so that he might respond to said subpoena (R. 32).

From this judgment and order denying and overruling said motion and petition an appeal was taken to the Circuit Court of Appeals for the Fifth Circuit (R. 1-3), and said judgment was affirmed (R. 63).

Specifications of Errors To Be Urged.

(1) The Circuit Court of Appeals erred in holding that in the original taking of said administrator's deed by the United States postal inspector and United States attorney from the clerk of the Superior Court of Murray County, Georgia, there was "no invasion of privacy, no physical or moral compulsion exerted, no unlawful search or taking from Davis" (R. 63).

(2) The Circuit Court of Appeals erred in holding that Davis had "made a voluntary exposition of the instrument which he now seeks to hide from view, and is not now in position to demand return of the deed and thereby suppress the story it tells" (R. 63).

The Circuit Court of Appeals has decided an important constitutional question in a way probably in conflict with

decisions of this Court and other Circuit Courts of the United States.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Fifth Circuit.

D. H. REDFEARN,
R. H. FERRELL,
Counsel for Petitioner.

BRIEF IN SUPPORT ON PETITION FOR WRIT OF CERTIORARI.

The sending of the administrator's deed by petitioner through the mail to the clerk of the superior court at Chatsworth, Murray County, Georgia, with the money to pay for its recording constituted the delivery of a private paper in trust upon an implied contract that the trust would be duly executed and the paper restored to him as soon as the purpose of the bailment or trust had been duly executed.

Kent's Commentaries, Book 2, page 558;

Story on Bailments, Chap. I, par. 2;

United States v. *Jesse Thomas, et al.,* 82 U. S. 337, 343, 344, 21 L. Ed. 89, 91, 92.

With the recording of said deed on December 5, 1941, this trust was consummated. The clerk's duty at that time was to restore the paper. This he did not do. Instead he called United States postal inspector McKew and advised him that he had on hand said administrator's deed. This warning by the clerk was the result of a previous visit by said inspector to the office of said clerk and an instruction by him to said clerk that he expected him to advise him the next time he received from petitioner a deed to be recorded. After said warning said clerk held said deed until the said postal inspector arrived, examined said deed and presented to the judge of the Superior Court of Murray County, in the name of the district attorney at Atlanta, Georgia, an ex parte motion which was served on no one but by which he sought and on December 9, 1941, did obtain possession of said deed for a period of twenty-eight days on the pretense that the possession of said original deed by the United States district attorney was necessary "for the purpose of an examination thereof as the same relates to the property to which the government as aforesaid has title" (R. 9, 10,

11). This was a subterfuge and a false representation. That this was a subterfuge is clearly established by the fact that said deed had already been recorded in the public records of Murray County, Georgia. Said original deed was not necessary for an examination of the title of any lands owned by the United States Government. Its story was fully disclosed by said public records. From that record said district attorney could have gleaned all the knowledge required for the filing of an action by the United States Government to remove said deed as a cloud on lands, the title to which was claimed by the United States. But it Was Not "The Story" Told by the Exposition of Said Deed for Recording Purposes That Said Inspector Was Seeking. He Needed the Story-Teller, the Original Deed Itself. Nothing short of the original deed would reveal what said inspector and district attorney needed for a criminal prosecution. Assistant district attorney Merritt admitted this when he testified that an examination of said original deed disclosed certain other facts which the district attorney deemed sufficient to authorize a criminal investigation (R. 47-48). Said inspector's mission, therefore, was to get the Story-Teller and carry it to the United States district attorney so that he might obtain the knowledge necessary for instituting a criminal prosecution of petitioner. The Object of the Motion filed in Murray County, Georgia, Was to Discover the Secrets Which Said Original Deed Carried on Its Face and Which Could Not Be Found Elsewhere and Then Use That Knowledge as the Basis for a Subpoena Duces Tecum Before the Federal Grand Jury. The employment of such a process to get possession of said deed from said clerk and by which said clerk was prevented from executing his trust and restoring to petitioner the actual possession of his private paper Was Without Authority Either Under the Laws of Georgia or the United States Being without

lawful authority the order of said judge of the Superior Court directing the delivery of said deed to said postal inspector was void and the seizure so made by said inspector was unlawful. It follows then that the knowledge of "certain other facts" disclosed by the examination by the district attorney of said deed and gained by the federal government's own wrong in seizing said papers without lawful authority and in violation of petitioner's constitutional rights cannot be used by the government in a criminal prosecution by serving a subpoena duces tecum upon said clerk for the delivery of said original deed to the federal grand jury in Atlanta, Georgia.

Silverthrone Lumber Co. Inc. v. *United States of America,* 251 U. S. 385, 64 L. Ed. 319.

The fact that said deed was returned to said clerk after a twenty-eight day period of investigation by the district attorney and a subpoena duces tecum served on him simultaneously with the redelivery requiring him to produce it before the federal grand jury in Atlanta did not cure the consequences of the illegal taking in the first instance. The knowledge gleaned by the examination of said deed after it had been procured illegally, and carried from Murray County to Atlanta, Georgia, some hundred miles or more away, constituted the basis for the issuance of said subpoena duces tecum. The source of the information had been polluted by an illegal seizure. That in itself fouls every bit of testimony discovered through an examination of said deed by said district attorney. Nothing that the government can do now will purge that testimony from the pollution effected by its original illegal seizure.

The Circuit Court of Appeals for the Second Circuit held in the case of *Flagg* v. *United States,* 233 Fed. 481, that when books and papers have been illegally seized and re-

turned after being closely examined, the evidence obtained as a result of such examination is not admissible.

In the case of *Watson, et al.* v. *United States,* 6 Fed. (2d) 870, the Circuit Court of Appeals for the Third Circuit held that testimony based on knowledge of the contents of papers illegally seized should be excluded.

Justice Holmes, speaking for this Court in said *Silverthorne Lumber Company* case, *supra,* gives us the key to the situation:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. * * *
>
> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act."

Again this Court, in the case of *Essgee Company of China, etc.* v. *United States,* 262 U. S. 151 67 L. Ed. 917, in commenting on the *Silverthorne* case, said:

> "This court held that the government could not, while in form repudiating the illegal seizure, maintain its right to avail itself of the knowledge obtained by that means, which otherwise it would not have had. In other words, we held that the search thus made was an unreasonable one, against which the corporation was protected by the 4th Amendment, and which vitiated all the subsequent proceedings to compel production."

The record clearly establishes the fact that said postal inspector and district attorney in their zeal for results went

on a fishing expedition without authority of law and having unlawfully discovered evidence which they deemed incriminating, thereupon set in motion machinery of the court which they deemed sufficient to purge them of their wrong and make available said evidence in criminal proceedings.

The Fifth Amendment to the Constitution of the United States was placed in that great instrument to prevent that thing from being accomplished. It was designed to protect every person against incrimination by a use of evidence obtained through search and seizure made in violation of his rights as established under the Fourth Amendment.

Marron v. *United States of America*, 275 U. S. 192, 72 L. ed. 231.

But the Circuit Court of Appeals by its judgment attempts to circumvent the foregoing authorities by stating that there was No Invasion of Privacy, nor physical or Moral Compulsion Asserted, nor unlawful search or taking from Davis of his private papers. Unless the act of said postal inspector McKew and the district attorney in seizing said papers by the motion filed in the Superior Court of Murray County and the order entered thereon was lawful and authorized by the laws of Georgia or the United States, then said seizure was an unlawful taking. At the time that said papers were taken on December 9, 1941, clerk Kendrick was a trustee for Davis. The recording was completed on December 5, 1941. The bailment under which said clerk had received said deed had been executed and it was his duty to restore its actual possession to Davis who then held the legal possession thereof. The mere fact that said clerk wrongfully continued the custody of said deed did not divest the owner, Davis, of his legal possession. The legal possession was in the owner Davis from the date it was recorded.

42 Am. Jur. 220, par. 42.

This legal possession clothed him with the same constitutional rights which he would have had had he been actually in possession. The four days that said clerk retained said paper after its record was induced by the false representations of said postal inspector. The taking of said deed on December 9th by said postal inspector and the district attorney was accomplished by subterfuge. The true purpose of the motion was concealed. The filing of the motion and the order entered thereon were without authority of law. Davis was not a party to the cause. He had no notice of the institution of the proceeding. It necessarily follows that the taking of said deed under said circumstances constituted an unlawful seizure.

It cannot be successfully argued that Kendrick, the clerk, as an agent of petitioner, by his conduct consented to the unlawful seizure. The consent of an agent has no binding authority unless it is authorized. The record does not show that Kendrick, the clerk and as the agent of petitioner, was authorized to consent to the unlawful seizure of the deed through the process employed by the United States attorney. Without such a showing the deed so seized unlawfully cannot be used in evidence against the petitioner.

In Re: *Amos* v. *United States*, 255 U. S. 313; 65 L. ed. 654;
United States v. *Rykowski*, 267 F. 866 (5).

In the case of *In Re Tri-State Coal & Coke Company*, 253 Fed. 605, the search warrants were fatally defective and it was held that the seizure of the books and papers of the petitioners was a palpable and flagrant violation of their rights guaranteed by the Constitution and that any acquiesence by some agent as to their seizure "was simply a choice of evils, when confronted by an officer of the United States armed with a warrant which he was determined to execute.

By virtue of no such means can the high constitutional rights of a citizen be invaded or taken away."

Irrespective of the generalities of the aforesaid holding of the Circuit Court of Appeals it appears by the admission of the district attorney that "certain other facts were disclosed" by the examination of the original deed by said district attorney which he "deemed sufficient to authorize a criminal investigation" (R. 48). This admission places this case clearly within the rule laid down by the Circuit Court of Appeals for the Third Circuit in the case of *Fraternal Order of Eagles, No. 778, Johnstown, Pa., et al.* v. *United States*, 57 Fed (2d) 93. In that case a search and seizure was based on information obtained by means of false representations. Of this the court stated:

> "The government may not make an entry by means of false representations, search as fully as possible without arousing suspicion, and later make the fruit of that entry and search the basis of what otherwise might be a legal search and seizure. When it appropriates the benefits, it must bear the burdens, of its own illegal acts. The grafting of the original entry and illegal search upon the later search and seizure did not cure what was unlawful in the first entry and search, but, on the contrary, made the whole unlawful. This search and seizure growing out of the false entry was an invasion of the indefeasible right of the personal liberty and private property of the appellants and a violation of the Fourth Amendment."

The Circuit Court of Appeals further attempts to justify its judgment in this case affirming the order of the district court denying the petition promptly filed by Davis to quash and suppress the use of said deed as evidence before said grand jury in Atlanta, Georgia, and for its return to him, by holding that Davis had "made a voluntary exposition of the instrument which he now seeks to hide from view and

is not now in position to demand return of the deed and thereby suppress the story it tells" (R. 63). This statement is an extreme misconception of the facts of the case. It is true that the contents of the deed have been recorded upon the public records of Murray County, Georgia. The story that that record tells is open to the eyes of the world but it is not "The Story" that the government seeks. The government is not now interested in "the story". The district attorney admitted this when he testified that an examination of the original deed disclosed "certain facts" which he "deemed sufficient to authorize a criminal investigation" (R. 48). What those "certain facts" are is not revealed by "the story" as told by the record in said clerk's office. Nor will a return of the original deed to Davis, the owner, suppress that story. If the government succeeds in the avowed "criminal investigation" it must have the story-teller, the original deed. The marks upon the face of the story-teller; the characteristics of the story-teller; and the lights and shadows of the handwriting itself, are the things that the government needs if it succeeds in instituting a criminal prosecution. None of these essential matters are disclosed by the so-called "story" as told by the record of the deed. Davis is not seeking and he does not wish to suppress that "story". That story must remain. It was as a protection to his title to the lands against the claims of third persons that said deed was placed upon the records. The exposition of the deed for that purpose was not voluntary. Its record was required by law.

> "Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land lies. The record may be made at any time, but such deed loses its priority over a subsequent recorded deed from the same vendor, taken without notice of the existence of the first."
>
> Section 29-401 Georgia Code Ann.

Even though the filing of the deed with the clerk to be recorded might have been a "voluntary exposition" thereof in the sense referred to by the Circuit Court of Appeals, the period of such "voluntary exposition" did not extend beyond the date of its record. It is absurd on the face of it to suggest that the "voluntary exposition" of a deed for the purpose of having it recorded so as to protect the owner's title against third persons is a "voluntary exposition" running with the deed wherever it may be found. But petitioner is seeking to have the story-teller illegally taken from him returned to him. It is his private paper. He is entitled to its actual possession. One of the incidents of ownership of property as guaranteed by the Constitution of the State of Georgia and of the United States is possession. This has been denied him by an unlawful seizure. It should not be condoned. It should be suppressed.

In the case of *United States of America* v. *Lefkowitz*, 285 U. S. 452, 464, 465, 466, 76 L. Ed. 877, 882, 883, this Court said:

> "Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were.
>
> * * * * * * *
>
> "The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, etc. * * *."

Petitioner's deed was illegally seized by said postal inspector and district attorney. It was wanted by said officers solely for use as evidence of crime. They are not entitled

to it. The seizure was plainly within the Fourth Amendment to the Constitution of the United States.

In the case of *United States* v. *Thomson*, 113 Fed. (2d) 643, 645(6), the Circuit Court of Appeals for the Seventh Circuit stated:

> "Where the papers of the accused are seized upon a search solely for use as evidence of a crime of which respondents were accused or suspected, the search may be described as unreasonable. In the Lefkowitz case the court said: 'Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were.'"

Inasmuch as it appears that it is the story-teller—the original deed and the evidence of crime, if any has been committed, and not the "story" that the recording of that deed proclaims—that petitioner seeks to suppress and have restored to him, the rule applied by the Circuit Court of Appeals is erroneous.

In order to sustain its theory that appellant had no right to demand the return of his deed because he had made a "voluntary exposition" thereof by filing it for record, the Circuit Court of Appeals cites the cases of *Pearlman* v. *United States*, 247 U. S. 7, 62 L. Ed. 950; *Schauble* v. *United States*, 40 Fed. (2d) 363; and *Newfield* v. *Ryan*, 91 Fed. (2d) 700.

The *Pearlman* case was bottomed on exhibits introduced by the owner in evidence in a patent infringement suit. They thereby became court records. By a stipulation they were impounded in the custody of the clerk for future use. Their use before a grand jury as a basis for an indictment was clearly outside of the constitutional provisions. Those

facts are not in any way similar to the facts in the present case. Here we have a private paper illegally seized and the knowledge gained through its illegal seizure used as a basis for issuing a subpoena duces tecum by a clerk without an order of the court, and later for its being impounded by the Judge of the United States District Court (R. 38, 30-32).

In the *Schauble* case the defendant was charged with using the mails to defraud. He voluntarily produced his files containing his private papers and left them with the officers of the government who later forwarded them to the United States attorney. Their use before the grand jury was indeed a "voluntary exposition" and not an invasion of the defendant's privacy. The facts in the present case are entirely different.

In the Newfield case subpoena duces tecum were issued in an investigation by the Securities and Exchange Commission and served on the Western Union and Postal Telegraph companies. The court held that all messages are sent subject to the conditions affixed by federal law; that one of these conditions is that messages filed with telegraph companies shall not be protected from the demand of lawful authority and that the taking of them by lawful subpoena was not such a demand that invaded privacy or took away any rights under the Constitution.

The case at bar seems to be one of first impression. No similar case has been found. The answer to the problem must be found by the use of similar principles of law. It is the established law of this and all federal courts that property, including papers as well as goods, which has been seized under a void search warrant is incompetent evidence against the accused and must be returned on petition for their return.

Honeycutt v. *United States* (C. C. A. 4th Circuit), 277 Fed. 939.

The deed filed by petitioner with the clerk of the court for record was his private paper. It was unlawfully seized. This unlawful seizure infected everything which thereafter transpired. All the efforts of the government to give the seizure of said paper a legal aspect have been in vain.

The construction of the Fourth Amendment given by the Circuit Court of Appeals in this case is too restricted. It should be construed liberally in favor of a citizen. The protection it affords should be applied not only to papers in the actual physical possession of an accused citizen, but to papers which the law requires him to entrust to a recording officer in order to protect the title to his property.

> "The constitutional guaranties against unreasonable searches and seizures and self-crimination should be liberally construed."
>
> *Felix Gouled* v. *United States*, 255 U. S. 298, 65 L. ed. 647.

Conclusion.

For the above reasons we respectfully submit that the writ of certiorari should be granted, and the judgment and opinion of the court below reversed.

Respectfully submitted,

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No. 590

In the Supreme Court of the United States

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OPINION BELOW

The opinion of the circuit court of appeals (R. 61–63) is reported at 138 F. (2d) 406.

JURISDICTION

The judgment of the circuit court of appeals was entered October 18, 1943 (R. 63), and a petition for rehearing (R. 64) was denied December 3, 1943 (R. 71). The petition for a writ of certiorari was filed January 10, 1944. The jurisdiction of this Court is invoked under Section 240 (a)

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of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner mailed a deed to the clerk of a Georgia court for recording. After the deed was recorded, but before it was returned by the clerk to petitioner, an agent of the United States, pursuant to an order of the Georgia state court, acquired temporary possession of the deed and examined it, upon the allegation that it related to property to which the United States had title and that possession of the deed was desired for the purpose of examining it in that connection. Examination of the deed revealed certain facts which warranted a federal criminal investigation and a subpoena duces tecum was issued to the state court clerk requiring him to produce the deed before a federal grand jury investigating petitioner's activities. The question presented is whether production of the deed before the grand jury would constitute an unreasonable seizure and compel petitioner to be a witness against himself, contrary to the Fourth and Fifth Amendments.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

> shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

On February 25, 1942, in the United States District Court for the Northern District of Georgia, petitioner moved to suppress and withhold from a federal grand jury a certain deed (R. 3–8). This deed, dated November 17, 1915, was an administrator's deed purporting to convey described real estate in Murray County, Georgia, to petitioner (R. 41–43). Petitioner alleged in his motion that on December 1, 1941 (25 years after the date of the deed), petitioner deposited the deed with the clerk of the Superior Court of Murray County, Georgia, for recording, in accordance with Georgia law, and that he instructed the clerk to return the deed to him after it had been recorded (R. 4);[1] that on December 8, 1941, the United States Attorney for the Northern District of Georgia, alleging that the deed related to prop-

[1] No such specific instruction, however, is contained in petitioner's letter transmitting the deed to the clerk (R. 55).

erty to which the United States had title and, also, that he desired possession of the deed for the purpose of examining it in that connection,[2] moved, *ex parte*, in the Superior Court, Murray County, for an order directing the clerk to deliver the deed to one McKew, a post-office inspector (R. 4–5, 8–9);[3] that the motion was granted and the clerk was directed to deliver the deed to McKew for 30 days (R. 5, 10); that the deed was delivered to McKew on December 9, 1941 (R. 5), and that thereafter the clerk was served with a subpoena duces tecum directing him to appear with the deed

[2] Petitioner claimed in his motion that this latter allegation was false (R. 6), but he made no effort in the proceeding to establish his claim. In his petition for a writ of certiorari (Pet. 8) he amplifies his assertion of falsehood by reasoning that the deed itself "was not necessary for an examination of the title of any lands owned by the United States Government" since the public record of the deed conveyed all the information required in that regard, and that the real purpose of the Government, in seeking to examine the deed, was to obtain evidence as to a federal criminal violation inasmuch as a representative of the Government testified that examination of the deed disclosed certain facts deemed sufficient to authorize a criminal investigation. Obviously petitioner's reasoning does not support his conclusion that the allegation was false. Examination of the deed itself might disclose that it was a forgery. This, of course, could be relevant to a proceeding to quiet title in the Government even though it might also be important in a determination as to whether the mails had been used in furtherance of a scheme to defraud the Government.

[3] It is not contended that the state court lacked statutory authority to give such a direction to its clerk. Code of Georgia, Annotated, secs. 24–2715 (10) and 24–2721; see also secs. 24–104 and 24–105.

before a federal grand jury investigating possible violations of law by petitioner (R. 6–7).[4] Petitioner asserted that the use of the deed before the grand jury would amount to a deprivation of his rights under the Fourth and Fifth Amendments (R. 7). An order to show cause issued (R. 11) and the United States Attorney (R. 16–18), McKew (R. 19–20), and the clerk of the court (R. 20–23), filed separate responses to the motion to suppress. That of the United States denied that the production of the deed would deprive petitioner of his constitutional rights.[5]

Petitioner's motion to enter judgment on the pleadings and stipulations was denied (R. 28–29), and on July 17, 1942, the court, upon appropriate findings, entered an order overruling the motion to suppress (R. 30–32). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit the judgment of the district court was affirmed (R. 63).

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[4] Although it does not so appear from petitioner's moving papers, the evidence at the hearing was that the subpoena was served on the clerk after McKew had returned the deed to him (R. 37, 45).

[5] The clerk's response alleged that on March 30, 1942, petitioner had moved in the Superior Court, Murray County, for an order directing the clerk to return the deed to him and that the court ordered the deed retained by the clerk until further order of the court. The order, however, authorized the clerk to produce the deed in response to the subpoena duces tecum issued by the federal district court. (R. 22–25; see R. 51–53.)

It was stipulated (R. 36–38) between the parties that the deed was delivered to the clerk of the Superior Court, Murray County, Georgia, for recording,[6] and that the deed was so recorded in the public records; that thereafter the deed was delivered by the clerk to McKew, a post-office inspector, pursuant to an order of the Superior Court of Murray County; that on January 6, 1942, McKew returned the deed to the clerk; and that immediately thereafter a subpena duces tecum requiring the clerk to appear before a federal grand jury with the deed was served on him.[7]

ARGUMENT

There is no support in the proof for petitioner's assertion (Pet. 8) that the state court order allowing the Government to examine the deed was obtained by the Government as the result of "a subterfuge and a false representation" (see footnote 2, *supra,* p. 4) and, therefore, it was not permissible for the Government to use the informa-

[6] Section 29–401 Code of Georgia Annotated, provides: "Every deed conveying lands shall be recorded in the office of the clerk of the superior court of the county where the land lies. * * *"

[7] The evidence supplementing the stipulation showed that when the clerk received the deed, he notified McKew pursuant to his prior request (R. 44, 46–47); that the Government was interested in the deed because it appeared to constitute a cloud on its title to the land purportedly conveyed to petitioner (R. 48), and the subsequent examination of it revealed facts "sufficient to authorize a criminal investigation" by the grand jury (R. 48).

tion which it obtained as the foundation for the subpoena duces tecum to the state court clerk to produce the deed before the federal grand jury (Pet. 9).

The question is, simply, whether production by the state court clerk of the deed before the federal grand jury, with the consent of the state court, pursuant to the subpoena duces tecum, would constitute an unreasonable seizure and the compelling of petitioner to be a witness against himself, in contravention of the Fourth and Fifth Amendments. The question is, we think, settled by the decision of this Court in *Perlman* v. *United States*, 247 U. S. 7. In that case it was held that one who voluntarily and to subserve his own interest had produced papers, models, etc., owned by him, as part of his testimony in an equity suit, in which they were impounded as exhibits, would not be subjected to an unreasonable seizure, or made to be a witness against himself, within the meaning of the Fourth and Fifth Amendments, by the delivery, through court order, of such exhibits to a United States Attorney and their subsequent use before a federal grand jury or in the trial court in a prosecution for perjury alleged to have been committed by the witness in his testimony. After pointing out that there was "a voluntary exposition" of the articles (p. 14), the Court examined a contention similar to that made here (Pet. 7, 11–

12, 15) and held it to be without merit. The Court said (p. 15):

> But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the Government without his consent. The extent of the insistence is rather elusive of measurement. It seems to be that the owner of property must be considered as having a constructive possession of it wherever it be and in whosesoever hands it be, and it is always, therefore, in a kind of asylum of constitutional privilege. And to be of avail the contention must be pushed to this extreme. It is opposed, however, by all the cited cases. They, as we have said, make the criterion of immunity not the ownership of property but the "physical or moral compulsion" exerted.

Here, as in the *Perlman* case (p. 15), petitioner "delivered the deed to publicity," for his own "advantage," and the deed passed beyond "his possession and volition," through appropriate judicial process, for an indisputably legitimate Government use.[8] The case is consequently not one of first impression, as petitioner seems to think (Pet. 17).

[8] See *Dier* v. *Banton*, 262 U. S. 147, 149–150; *Johnson* v. *United States*, 228 U. S. 457; *Schenck* v. *United States*, 249 U. S. 47, 50; *Burdeau* v. *McDowell*, 256 U. S. 465; *Schauble* v. *United States*, 40 F. (2d) 363 (C. C. A. 8); *Fuller* v. *United States*, 31 F. (2d) 747 (C. C. A. 2), certiorari denied, 280 U. S. 556; *United States* v. *Reiburn*, 127 F. (2d) 525, 526 (C. C. A. 2); see also *United States* v. *Hoyt*, 53 F. (2d) 881, 885–886 (S. D. N. Y.); cf. *Ex parte Fuller*, 262 U. S. 91, 93.

CONCLUSION

The petition for a writ of certiorari presents no question of importance, the case was correctly decided, and there is involved no conflict of decisions. We therefore respectfully submit that it should be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 590

C. EDWARD DAVIS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

D. H. REDFEARN,
R. H. FERRELL,
Counsel for Petitioner.

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REPLY BRIEF OF PETITIONER.

In petitioner's brief he stated that the government's motion to the Superior Court of Murray County, Georgia, for the delivery of the deed in question to postal inspector McKew was a subterfuge and misrepresentation (R. 8, 9). The government in its reply brief states that there is no support in the proof for this assertion (Br. 6). Nevertheless, as a justification for said motion the government admits an "examination of the deed itself might disclose that it was a forgery" (Br. 4, note 2). This confession is a strong suggestion that the motion was a subterfuge. There is no allegation in the motion itself that the govern-

ment had reason even to believe that the deed in question was a forgery and that the original was necessary in an examination to establish such an issue.

Proof of a subterfuge is seldom ever established by direct testimony. It is arrived at by circumstantial evidence and deductions. That the motion as filed was a subterfuge and a misrepresentation is established by the fact that a postal inspector was in charge of the case and that it was to him that the deed was committed as the agent of the United States district attorney. By what statutory authority has a postal inspector become an officer of the government to examine and quiet titles to land owned by the government? It is common knowledge that postal inspectors' duties include ferreting out crimes in connection with the handling and transportation of mails. It should be remembered that said postal inspector had approached said clerk several weeks before the deed was received by him and said clerk was warned by said postal inspector to advise him when the deed was received. Was this official act on the part of a postal inspector an act of precaution on the part of the government to remove a cloud on the titles to land? It could hardly have been such for at that time the cloud on the titles to the lands involved did not even exist. The deed had not yet been filed with the clerk. The interest of said inspector, therefore, must have been prompted by an anticipated commission of some crime involving the mails. Clouds on the title per se do not involve crime. His interest had to relate to some other federal law than that involved in determining the validity of titles to lands owned by the government. The petition on its face, the admission of the assistant district attorney, Astor Merritt, that the subsequent examination of the deed by the district attorney revealed facts "sufficient to authorize a criminal investigation", and now the confession of the government that an "examination of the deed itself might disclose that it was

a forgery", which fact would be relevant to a proceeding to quiet title, prove conclusively that the motivating cause beginning with the visit of said postal inspector to said clerk and his instructions given him together with his action before the Superior Court of Murray County and ending with the serving of the subpoena duces tecum by the marshal on said clerk simultaneously with its return to the clerk by said postal inspector was to get possession of a deed which they secretly believed to be forged.

The government in its brief states that petitioner does not contend "that the state court lacked statutory authority to give such directions to its clerk" (Br., 4, note 3). It then cites several sections of the Georgia Code in the hope apparently to influence the court to believe that authority of law did exist for the action taken by the Superior Court Judge. But an examination of these sections shows that they do not apply even remotely. Petitioner not only contends that there was no statutory authority for the action of the district attorney at Atlanta and the judge of said Superior Court, but there was no authority of any kind which authorized the filing of such an ex parte petition by a district attorney of the United States government and the entering of an order thereon requiring said clerk to deliver to a postal inspector a deed to be retained by him for a period of thirty days (R. 10). The court was absolutely without jurisdiction either of the subject matter or of the parties. So, whatever order it may have entered was of no force and effect. The government has failed to cite one authority which supports the procedure followed by the district attorney in Atlanta by which he originally gained possession of the deed in question and learned sufficient facts which suggested a criminal investigation.

That the proceedings before said judge was a subterfuge is suggested also by the fact that it was instituted without

the authority of the attorney general or the secretary of agriculture. The motion of the government acting through the district attorney at Atlanta was predicated on the theory that it was a step on the part of the government to remove a cloud from the title of lands owned by the government but it never proved or showed that the action was taken with the permission of the attorney general at the suggestion of the secretary of agriculture who had exclusive jurisdiction of the government's public lands. On the other hand it was admitted by the government that permission had not been obtained (R. 47). If the motion was such a step and was undertaken without such authority the entire proceeding was ineffective.

16 U. S. C. A., Section 472; 5 U. S. C. A., Section 313;
United States v. *Samuel R. Throckmorton, et al.*, 98 U. S. 61 (1), 70;
San Jacinto Tin Company, et al. v. *United States*, 125 U. S. 273 (2), 308.

The government states that the clerk of the Superior Court of Murray County alleged in his response on March 30, 1942, that petitioner had moved in the Superior Court of Murray County for an order directing the clerk to return the deed to him and that the court had ordered the deed retained by the clerk (Br. 5, note 5). This does not change the status of the original taking on December 8th and 9th, 1941 (R. 10, 11), which was without authority of law and which was in violation of petitioner's constitutional rights. Every lawful act which may have been undertaken by the government after the first illegal taking would not purge the original taking of its illegality.

Respectfully submitted,

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